STATE OF MICHIGAN

COURT OF APPEALS

PAULA CARTWRIGHT,

Plaintiff-Appellant,

v

RITE AID OF MICHIGAN, INC.,

Defendant-Appellee.

UNPUBLISHED
March 15, 2007

No. 272691
Roscommon Circuit Court
LC No. 05-725652-NO

Before: Servitto, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as right from the trial court's order granting summary disposition to defendant pursuant to MCR 2.116(C)(10). We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

We review de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We must review the record in the same manner as the trial court to determine if the moving party was entitled to judgment as a matter of law. *Morales v Auto Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). A motion made pursuant to MCR 2.116(C)(10) test the factual basis for a claim. We consider all the pleadings, depositions, affidavits, or documentary evidence and photographs in a light most favorable to the nonmoving party. *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). A motion for summary disposition under MCR 2.116(C)(10) can be granted only when the proofs show that there is no genuine issue of material fact.

Plaintiff and two friends went to defendant's store in Houghton Lake on July 8, 2005. When plaintiff left the store, she walked along a concrete walk and, as she neared her truck, she came to the edge of the concrete curb. Plaintiff looked at the curb and put her foot on the edge of it to step down onto the asphalt. She testified, clearly, that there was nothing observably wrong with the curb where she put her foot. As plaintiff's weight bore down on the concrete, the concrete crumbled away under her foot and she fell forward, injuring her wrists and ankles.

A passenger in plaintiff's truck saw plaintiff fall, but did not see plaintiff's feet. A second passenger in the truck also saw plaintiff fall. This passenger testified that the concrete edge of the curb was intact before plaintiff fell, but was crumbled after the fall occurred.

The store manager testified that cars ran into the edge of the concrete curb every day, and that over the course of time the edge of the walkway and curb had been rounded off. The manager reviewed photographs taken after the fall occurred and acknowledged the appearance of areas of the curb where concrete was missing. The manager also acknowledged that salt was used on the walk, and had heard that salt would cause concrete to weaken and crumble.

A landowner is subject to liability to an invitee for harm caused by a condition on his property where: (1) the owner knows of, or by the reason of the exercise of due care would discover the condition, and should realize that the condition involves an unreasonable risk of harm to the invitee, (2) the owner should expect that the invitee will not discover the condition or realize the danger, or protect himself against it, and (3) fails to take reasonable care to protect an invitee against the danger. *Riddle v McLouth Steel Products*, 440 Mich 85, 93; 485 NW2d 676 (1992). However, the duty to warn or prevent harm to an invitee does not extend to conditions that are open and obvious. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001).

The test for an open and obvious hazard is whether an average person with ordinary intelligence would be able to discover the danger and appreciate the risk upon casual inspection. The test is objective, and the question is not whether the invitee should have known of the danger, but whether a reasonable person, as an invitee, would foresee the hazard and the danger. *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002).

Here, plaintiff indicated that she looked before she stepped on the curb, and that the concrete looked like concrete. Our review of the plaintiff's testimony and the photographs that were shown to the witnesses who were deposed convinces us that this hazard was not open and obvious. Summary disposition was therefore improper on that basis.

Defendant alternatively argues that summary disposition was proper in this case because Rite Aid had no knowledge of the defect in the walkway and curb. The question of notice of the defect is a question of fact, not an issue of law. *Kroll v Katz*, 374 Mich 364, 372; 132 NW2d 27 (1964); *Cruz v Saginaw*, 370 Mich 476, 481; 122 NW2d 670 (1963).

Here, the manager testified that she regularly inspected the parking lot for trash and to determine whether there were any major problems that needed to be fixed. The manager also testified that photographs of the curb showed that areas of the curb were missing concrete. Given this testimony, a question of fact exists as to whether defendant knew or should have known of the defect in the curb and the danger that a decayed or defective concrete curb might pose to its business invitees. *Clark v K-Mart Corp*, 465 Mich 416, 421; 634 NW2d 347 (2001).

Reversed and remanded. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Bill Schuette